60158-0

60158-0

81812-6

NO. 60158-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ANDREA SHOEMAKE, by and through Julie Schisel, Guardian ad Litem, and KEITH SHOEMAKE, and their marital community,

Appellants/Cross-Respondents,

vs.

R. DOUGLAS P. FERRER and JANE DOE FERRER, husband and wife,

Respondents/Cross-Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Charles W. Mertel, Judge

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

REED McCLURE
By John W. Rankin, Jr.
Attorneys for Respondents/Cross-Appellants

Address:

Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Page

Other Jurisdictions

Rules and Regulations

I. NATURE OF CASE

Plaintiffs' appeal asks this court to create a special rule of punitive damages for attorney defendants in legal negligence cases. Punitive damages have never been the law in Washington. The trial court rejected plaintiffs' arguments for adoption of a unique rule of damages for defendant attorneys. So should this court.

Defendant Ferrer admittedly failed to meet the professional standard of care when he did not properly conclude settlement of an uninsured motorist (UM) claim on behalf of his clients, the plaintiffs. Defendant's liability for this negligence was obvious, and was never a contested issue in this case. Defendant admitted liability in his Amended Answer to Complaint (CP 256- 58).

Thus, from a liability standpoint, this case was the legal negligence equivalent of a rear-end auto collision case. Resolution of the case should have been quite simple, as liability was not disputed and the recovery available in the underlying case was a known, fixed amount. Instead, the case has been complicated and extended by the plaintiffs' efforts to obtain an award of more than the full compensatory damages recoverable under Washington law.

The trial court saw the case for what it was, ruled against plaintiff twice on their damages theories, and refused to reward plaintiffs' effort to

inflate this simple case by rejecting their claims for unnecessarily-incurred attorney fees.

In fact, attorney's fees are not legally recoverable here. The trial court decided, *sua sponte*, to award fees on summary judgment although the issue had not been raised or briefed in the parties' cross-motions for summary judgment. That decision is the subject of defendant's cross-appeal.

II. ISSUES PRESENTED

1. Did the trial court correctly rule on summary judgment that plaintiffs' recoverable damages for legal malpractice are limited to their actual loss suffered in the underlying case because of their attorney's negligence?

2. Did the trial court correctly rule that plaintiffs were entitled to prejudgment interest on their actual loss suffered in the underlying case because of their attorney's negligence?

3. Did the trial court correctly rule that the entire sum of money received from plaintiffs' UM insurer must be credited against plaintiffs' recoverable damages found by the court, plus prejudgment interest upon those damages, to determine the remaining judgment amount to be entered against defendant?

4. Did the trial court properly exercise its discretion in reducing plaintiff's claimed attorney fees for unnecessary legal work on the case?

5. Did the trial court properly exercise its discretion in refusing to grant the lodestar multiplier requested by plaintiffs where liability was admitted, the law guaranteed recovery from the UM insurer, and the bulk of the damages had already been recovered before plaintiffs' counsel spent significant time on the case?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff Andrea Shoemake was injured in an automobile accident on April 9, 1992, when Joseph Hernandez, an uninsured, intoxicated driver, crossed the centerline and struck Ms. Shoemake's vehicle head-on. (CP 9-10).

The Shoemakes carried automobile insurance, including UM coverage, with State Farm. The Shoemakes' policy limits for UM coverage were $100,000. (CP 11).

The Shoemakes retained defendant Ferrer to represent them in connection with their claims arising from the accident with Hernandez. The Shoemakes and Ferrer executed an agreement providing for a contingent fee of 40 percent on any recovery. (CP 9, 10, 12, 14-18).

Ferrer made an appropriate claim to State Farm under the Shoemakes' UM insurance, and provided the insurer with the necessary information to support the claims for liability of the uninsured motorist and for Ms. Shoemake's injuries and damages. (CP 11). Through these efforts, Ferrer obtained a settlement offer from State Farm on June 19, 2005, for the $100,000 limits of the Shoemakes' UM policy. (CP 11).

In the meantime, Ferrer had also served Hernandez with process, and filed suit against him. (CP 10). Ferrer had determined through investigation that Hernandez was unemployed and had no identifiable assets. (CP 10). Hernandez was convicted of DUI as a result of the accident. (CP 10). Following his release from the jail sentence resulting from the conviction, Hernandez disappeared, apparently leaving the jurisdiction. (CP 10).

Ferrer kept the suit against Hernandez alive for a time, but eventually allowed it to be dismissed by the court due to the inability to locate Hernandez and the fact that Hernandez was judgment-proof. (CP 10-11).

Ferrer failed to advise his clients of the State Farm settlement offer, and failed to conclude the settlement on behalf of his clients. (CP 12). He also failed to tell his clients that the suit against Hernandez had been dismissed.

This action was commenced in January, 2006. (CP 1-6). Pursuant to the agreement of the plaintiffs' current counsel by letter of March 23, 2006 (CP 239), Ferrer's defense counsel contacted State Farm to reopen the Shoemakes' UM claim, and obtained payment, in April 2006, of the $100,000 UM limits previously offered. (CP 236).

The UM recovery from State Farm was based upon defendant's previous work in presenting the claim, and State Farm's ongoing liability for the UM payment as established in *Safeco Ins. Co. v. Barcom*, 112 Wn.2d 575, 773 P.2d 56 (1989). (CP 235-37).

At the time State Farm's policy limits were paid, plaintiffs' counsel had expended a total of 6.4 hours on the case. (CP 285-86).

Following receipt of the $100,000 payment from State Farm, the plaintiffs made a settlement demand on Ferrer in the amount of $123,205.47, in addition to the $100,000 received from State Farm, by Mr. Gould's letter of May 8, 2006. (CP 349-50). In that letter, the plaintiffs' counsel acknowledged that liability was not an issue of significance in the case, as liability defenses were not mentioned as a impediment to settlement. Rather, counsel identified the problematic issue at that early stage: "If you are still 'enamored', with the preposterous position that [Ferrer] is entitled to a 1/3 contingency, I would appreciate your advising

me of that fact so I can arrange for a mutually agreeable date and time for Judge Mertel to deal with that by summary judgment." (CP 349).

B. STATEMENT OF PROCEDURE.

Defendant admitted liability for legal negligence in his Amended Answer to Complaint, and also admitted damages in the amount of $52,088. (CP 256-58). This admitted damages amount consisted of the State Farm policy limits of $100,000, less the 40 percent contingent fee defendant would have collected had he concluded the case, and less a subrogation interest against plaintiffs' recovery held by Fieldcrest Cannon, Inc. in the amount of $7,912. (CP 11-12).

The parties filed cross-motions for summary judgment, which were heard by Judge Mertel on February 9, 2007. (CP 40-59, 219-27). Plaintiffs' motion sought a summary judgment determination of liability for both legal malpractice and breach of fiduciary duty. (CP 40-59). Additionally, plaintiffs' motion sought a ruling on the damages issue raised by plaintiffs' counsel in his letter of May 8, 2006, (*i.e.*, the effect of defendant's contingent fee if the representation in the underlying case had been properly completed) upon the plaintiffs' recoverable damages in the negligence case. (*Id.*)

Defendant had already formally admitted liability for negligence, and thus did not contest that aspect of plaintiffs' motion. Further,

defendant did not contest liability for breach of fiduciary duty, although he did question the relevance of that issue, and plaintiffs' related "fee disgorgement" argument, to the damages issue presented to the court. (CP 252-54).

Defendant's motion sought a summary judgment order that plaintiffs' recoverable damages in the malpractice case were the actual recovery plaintiffs would have obtained in the UM case if properly completed, plus prejudgment interest on that amount, less the $100,000 payment already received from State Farm. (CP 219-27). Defendant agreed that damages were $52,088, and that plaintiffs were entitled to prejudgment interest on that amount. (CP 219, 225-26).

The trial court entered its order on the cross-summary judgment motions on February 15, 2007. (CP 269-72). The Order granted plaintiffs' motion on liability, although defendant had already admitted liability for negligence and did not contest liablity for breach of fiduciary duty. Although the Order purported to deny defendant's motion for summary judgment, it actually granted the relief requested in defendant's motion on the principal issue in the case, the damages recoverable for the admitted negligence:

> Judgment for the Plaintiff is entered in the amount of $60,000.00, together with prejudgment interest as delayed damages on the $100,000 State Farm UIM Policy proceeds

> that would have been paid on June 19, 1995, but for defendants' malpractice and breach of fiduciary duty, until April 18, 2006, which represents the date on which State Farm paid its $100,000 UIM policy limits.

(CP 271).

Thus, the court ruled in favor of defendant on the damages issues, with the sole exception of the $7,912 subrogation offset. Plaintiffs' contention (App. Br. 11) that the trial court "adopted most of the Shoemakes' theories concerning remedies" is simply false.

Although neither party had raised an issue of an award of attorney fees in the motions, and there was no briefing on the subject before the trial court, the court, *sua sponte*, ordered that as a sanction for defendant's breach of fiduciary duty, plaintiffs were awarded reasonable attorney fees. (CP 271). Defendant timely moved for reconsideration of the award of attorney fees, because there was no contract or applicable statute authorizing them, and further, because neither a legal negligence claim nor a breach of fiduciary duty claim constituted a recognized ground in equity supporting an award of fees. (CP 397-98). That motion was denied by the court's order of March 6, 2007. (CP 399-400).

Notwithstanding losing its principal argument on summary judgment regarding the proper calculation of damages, plaintiffs, unbowed, continued to claim entitlement to a damage award nearly equal

to that claimed prior to the summary judgment order, and well above the amounts yielded by a straightforward mathematical calculation of the damage to plaintiffs less the sum received from State Farm. (CP 327, CP 328-33). Defendant thus filed a motion for clarification of the summary judgment order, seeking a ruling that the net damages, plus prejudgment interest, owed by defendant after crediting the $100,000 payment from State Farm, equalled $30,511.58. (CP 304-06, 415-20). Plaintiffs opposed the motion for clarification, and asserted a cross-motion seeking to establish damages within a considerably higher range, proposing three different theories of calculating the damages to achieve this range. (CP 328-33, 320-27). The trial court granted defendant's motion by order of April 9, 2007, quantifying the damages and precluding any further mischaracterization by plaintiffs of the damages available: "...it is ordered that judgment entered against defendants is to be in the amount of $130,511.58 plus attorney fees, less the $100,000 State Farm payment previously made, for a net of $30,511.58 + Attorney fees." (CP 339-40).

Plaintiffs filed a motion for award of attorney fees, seeking a lodestar fee award of $31,050, together with costs of $1,853.41. (CP 273-78, CP 285). Plaintiffs also sought a lodestar multiplier of 1.5, bringing the total requested fee award to $48,428.41. (CP 273-78). Defendant opposed considerable portions of plaintiff's lodestar calculation, as well as

the requested multiplier, because a substantial portion of the requested fees were incurred unnecessarily, particularly on the unsuccessful claim for excess damages. (CP 312-19). Defendant suggested in his response to plaintiffs' motion for a fee award that a proper lodestar calculation yielded fees and costs of $16,137.82, and requested the court grant plaintiffs' fee request in that amount (CP 316, 318). By letter ruling of April 10, 2007, the court adopted the reasoning in defendant's opposition brief, and set the award of fees and costs to plaintiffs at the figure suggested by defendant, $16,137.82. (CP 373).

The court entered Findings of Fact and Conclusions of Law in support of the attorney fee award, (CP 374-78) and an Order awarding fees and costs in the amounts set out in the letter ruling. (CP 379-80). Final Judgment was entered on May 25, 2007 in the total amount of $49,009.76. (CP 341-43).

IV. ARGUMENT

A. DAMAGES IN LEGAL MALPRACTICE ACTIONS ARE THE ACTUAL LOSS TO THE INJURED CLIENT.

Damages allowable in legal negligence cases are governed by the same principles as other tort claims. The rule is that the plaintiff/victim is awarded damages to place him in as good a position as if the wrong had not occurred. *Tilly v. Doe*, 49 Wn. App. 727, 731-32, 746 P.2d 323 (1987), *rev. denied,* 110 Wn.2d 1022 (1988). In Washington, the

"measure of damages for legal malpractice is the **amount of loss actually sustained** as a proximate result of the attorney's conduct." *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000) (emphasis added); *Tilly v. Doe*, 49 Wn. App. at 732; *Martin v. Northwest Wash. Legal Services*, 43 Wn. App. 405, 412, 717 P.2d 779 (1986).

Matson repeats well settled Washington law that clients are not entitled to receive a windfall as a result of their attorney's negligence. In *Matson*, the court considered whether the collectibility of the underlying judgment not obtained because of the negligence should be a factor in determining damages in the legal malpractice case. The court concluded that collectibility had to be considered in assessing damages to prevent the plaintiff from receiving a windfall in the malpractice action. The court reasoned as follows: "'**[I]t would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff would have collected from the third party.**'" *Matson*, 101 Wn. App. at 484 (emphasis added), quoting from *Kituskie v. Corbman*, 452 Pa. Super. 467, 682 A.2d 378, 382 (1996), *aff'd*, 552 Pa. 275, 714 A.2d 1027 (1998).

In this case, the actual loss suffered by the plaintiffs as the result of defendant's negligence was $60,000. That is the amount they would have recovered in 1995 from their UM claim with State Farm, net of the

transactional costs, i.e., the agreed-upon contingent fee, had the negligence not occurred. The plaintiffs do not dispute the truth of this fact, nor could they. Thus, $60,000 represents the damages recoverable in the malpractice case under Washington law. That is the amount awarded by the trial court, and is correct.

B. WASHINGTON LAW DOES NOT PERMIT PUNITIVE DAMAGES.

It goes almost without saying that punitive damages are contrary to long-established policy in this state, and are not recoverable. As this court noted in *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994), *rev. denied,* 126 Wn.2d 1015 (1995):

> . . . Washington does not recognize punitive damages. *Barr v. Interbay Citizen's Bank*, 96 Wn.2d 692, 699, 635 P.2d 441, 649 P.2d 827 (1981). This has been settled Washington law since the rationale underlying punitive damages was first rejected over 100 years ago. In *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 51-52, 25 P. 1072 (1891) our Supreme Court considered and rejected the argument that civil actions should not only compensate the injured party but also punish the offender.

76 Wn. App. at 410.

Despite this prohibition against punitive damages, plaintiffs argue for a recovery greater than full compensation of their loss. Further, much of this argument is couched in terms suggestive of a desire to punish the defendant for his admitted negligence, and plaintiffs advocate creating a special rule of punitive damages applicable to lawyer-defendants. The

thrust of plaintiffs' damages arguments is that defendant's conduct was despicable, warranting "extra" damages. Plaintiffs' claims for damages in excess of full compensation can only be viewed as a type of punitive damages applicable only to lawyers.

In considering the very issue presented by plaintiffs here, the Supreme Court of Wyoming stated: "While we do not believe that attorneys should be treated more favorably than any other class of negligent defendants, we think they are entitled to equal treatment." *Horn v. Wooser*, 165 P.3d 69, 74 (Wyo. 2007).

Similarly, while also considering the question of plaintiff's recovery in a legal malpractice case where the defendant attorney had a contingent fee agreement with the plaintiff client, the First Circuit Court of Appeals reasoned in *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987):

> Restricting the client's recovery in a ... malpractice action to the realizable net proceeds from his earlier case does not allow a culpable attorney to "collect" anything. More importantly, **the argument to the contrary overlooks that the fundamental purpose of such damages is to compensate a plaintiff, not punish a defendant.**

Moores, 834 F.2d at 1111 (emphasis added).

The trial court properly awarded plaintiffs their compensatory damages, and refused to adopt plaintiffs' disguised punitive damages

theory. This court should affirm that result as proper under Washington law.

C. DEFENDANT MADE NO CLAIM FOR FEES.

Plaintiffs attempt to skew the analysis of their argument with the contention that defendant seeks a "credit" for the contingent fee he was contractually entitled to if the UM case had been properly completed. Plaintiffs similarly argue that the trial court has granted defendant a "reward" or a "recovery" in this case. From those statements, it is but a short semantic jump to the plaintiffs' claim that defendant's conduct requires disgorgement of fees, or denial of fees. From there, plaintiffs make a final leap, arguing a competely false analogy, as if this were a case about a claim for unpaid fees.

The fact is that defendant has made no claim to any fees from the plaintiffs' UM recovery paid by State Farm. (CP 12, 221). Plaintiffs received the entire $100,000 policy limits payment. (CP 60-61, 236). Thus, the contention that defendant claims a "credit" for the fee he would have received is false. Defendant makes no claim to a fee or a credit. What defendant does contend, however, is that his negligence does not entitle the former clients to recover from him more than they would have obtained in a successful UM case.

D. THE COURT SHOULD NOT CREATE A SPECIAL DAMAGES RULE FOR ATTORNEY DEFENDANTS.

Plaintiffs claim that they are entitled to recover as damages from Defendant: (1) the amount that they would have recovered from State Farm *plus* (2) the contingent fee that defendant would have received had he handled the case properly. Plaintiffs thus argue that the normal rule of damages in attorney negligence actions, as represented by *Tilley v. Doe*, 49 Wn. App. 727, should not apply here. Rather, plaintiff proposes a special rule should be crafted in Washington, placing attorneys in a unique class of defendants to which normal tort damages rules do not apply.

In support of this new rule, plaintiffs cite several of out-of-jurisdiction cases holding that a legal malpractice plaintiff's recovery is the gross amount of the judgment or settlement that should have been realized in the underlying case, without reduction for the contingent fee the defendant attorney would have realized upon proper completion of that underlying case. It is not surprising that plaintiffs cite no Washington cases supporting this unique rule of damages, because there are none. Nor are there any Washington cases that even hint that our courts would ignore the long-accepted rules of tort damages in the legal negligence setting.

The question of treatment of the putative contingent fee in an attorney malpractice action was considered in depth by the Wyoming

Court in *Horn v. Wooser*, 165 P.3d 69 (Wyo. 2007), including an analysis of the cases from other jurisdictions which had ruled on the issue. The Wyoming court concluded that its existing law of damages required that the malpractice plaintiff's recovery be confined to the plaintiff's actual loss, in other words:

> . . . an aggrieved client should be entitled to recover from the negligent attorney the amount he would have expected to recoup if his underlying action had been successful. It would, therefore, be appropriate to deduct the attorney's contingency fee from the amount the jury determines the underlying judgment would have been because the client's ultimate recovery in the underlying action would have been reduced by that expense.

Horn, 165 P.3d at 74.

It is apparent in *Horn* that Wyoming legal malpractice damages law is the same as Washington's. This court, like the Wyoming Court, thus should analyze this issue in terms of the actual loss to the client:

> Concentrating on the question of what the client lost as a result of the attorney's negligence requires the deduction of all expenses which the client would have incurred in order to successfully prosecute his claim, including the attorney's fee expense. This rationale focuses on compensating the client rather than punishing the negligent attorney.
>
> We, therefore, reject a general rule that a client may recover more than he lost simply because the defendant was an attorney who was negligent in performance of his duties. Instead, the well-accepted principles for calculation of damages in both contract and tort cases should be applied and the plaintiff should receive an award that would place him in the same position he would have enjoyed had the negligence not occurred.

Horn, 165 P.3d at 75 (footnote omitted).

The *Horn* Court discussed the apparent reasoning of the courts which allow the malpractice plaintiff to recover the contingent fee amount as well as the client's actual loss:

> By refusing to deduct the contingent fee from the malpractice award simply because the attorney was negligent, the courts appear to be punishing the attorney for his negligence rather than compensating the client for his loss. *See, Moores*, 834 F.2d at 1110-11. Indeed, some courts seem apologetic because a member of their profession acted negligently and appear to want to avoid any possible inference that they did not deal severely enough with the negligent acts of one of their own. *See, e.g., Campagnola*, 556 N.Y.S.2d 239, 555 N.E.2d at 614, *McCafferty*, 817 P.2d at 1045.

Horn, 165 P.3d at 74.

Reaching the same result as *Horn* (and relied upon by the *Horn* Court) was the First Circuit in *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987). Both Courts addressed one of the stated rationales of those courts permitting recovery of the contingent fee amount (and repeated by plaintiffs here), that disallowing recovery of the contingent fee by the client would force him to pay attorney's fees twice to collect one recovery. Both Courts rejected that argument, pointing out that the American rule regarding payment of attorney fees puts the burden of such fees on the respective litigants. Thus, in the absence of a contract or statute allowing

recovery of fees, payment of fees is simply a cost of achieving recovery for a wrong, whether from an attorney or any other tortfeasor.

As the Court in *Horn* reasoned:

> In our view, refusing a deduction for the contingent fee on the basis that the second fee cancels out the first, or allowing an award as consequential or incidental damages of the malpractice, is inconsistent with the American rule. We see no reason for creating an exception to the American rule when legal malpractice is involved, and, in fact, believe such an exception would undermine the rule because in any litigation it could be argued the plaintiff is harmed because of the need to pay attorney's fees to pursue his or her legal rights. *See also Moores*, 834 F.2d at 1111.

Horn, 165 P.3d at 75.

In our case, at the point of the negligence, defendant had done the work necessary to make the plaintiffs' UM claim to State Farm. He had assembled and provided the insurer with the information required to allow it to evaluate the claim and determine that it merited payment of the policy limits. He had obtained the policy limits offer. (CP 9-12). When defense counsel approached State Farm in March 2006 (with the authority of plaintiffs' counsel), the insurer already had the information in its file needed to make a speedy decision to pay the policy limits, which occurred on April 28, 2006. (CP 61, 235-241).

That is not the scenario presented by the cases upon which plaintiffs rely for their new rule of damages. For example, in *Campagnola*

v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990), the defendant attorney had done nothing towards recovery of the underinsured motorist policy limits at issue in the case, and had in fact caused that claim to be barred by settling with the tortfeasor's insurer without notifying or obtaining permission from the UIM carrier, as required by the policy. The court in that case noted:

> It is especially appropriate to deny credit for a fee where, as here, the defendant attorneys performed absolutely no services in connection with the disputed claim, and thus, even if discharged by the plaintiff without cause, would not have been entitled to any quantum meruit compensation.

555 N.E.2d at 614 (citation omitted).

Similar fact patterns were presented to other courts which adopted the rule plaintiffs advocate here: *Carbone v. Tierney*, 151 N.H. 521, 864 A.2d 308 (2004) (attorney's procedural missteps in initial filing of suit led to dismissal); *Distefano v. Greenstone*, 357 N.J. Super. 352, 815 A.2d 496 (2003) (attorney failed to file suit within the statute of limitations), *cert. denied,* 822 A.2d 608 (2003); *Kane, Kane & Kritzner v. Altagen*, 107 Cal. App. 3d 36, 165 Cal. Rptr. 534 (1980) (attorney filed, but failed to serve, summons and complaint resulting in case dismissal); *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990) (attorney did little work on case, took job with firm representing defendant, and then forced client to accept token settlement).

In all of these cases that plaintiffs rely upon as support for the new rule of damages they would have this court adopt, the defendant attorney either did nothing to pursue the client's case, or failed to properly complete the first steps in the process. Here, the facts are the opposite – defendant did pursue the case, failing only to complete the last step. Thus, not only would the rule of damages plaintiffs seek here be contrary to established Washington law, the facts of the cases plaintiffs cite demonstrate they are different from the facts here.

Plaintiffs repeatedly cite *Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1996) for the notion that legal negligence plaintiffs are entitled to recover, as a part of their damages, "mitigation expenses," including "replacement counsel's contingent fee and expenses." (App. Br. 17, 23, 25). The mitigation expense concept is then touted for abandonment of the American rule, and for the argument rejected by *Moores* and *Horn* that the malpractice plaintiff should recover her actual loss **plus** the contingent fee, because the plaintiff will have to pay her malpractice lawyer a fee. However, *Flint v. Hart,* 82 Wn. App. 209, does not stand for a "mitigation expense" concept, and the citation is simply misleading. *Flint v. Hart*, to the extent it deals with attorney fees (the main thrust of the case is examination of the independent business judgment rule), is an equitable indemnity case following *Manning v. Loidhamer*, 13 Wn. App. 766, 538

P.2d 136, *rev. denied*, 86 Wn.2d 1001 (1975), concerning recovery of attorney fees paid in litigation with a third party due to the tortfeasor's negligence.

Plaintiffs' counsel, in characterizing himself as "replacement counsel," attempts to invoke the equitable indemnity concept. The characterization is wrong, and the concept inapplicable in this situation. Mr. Gould was not retained as "replacement counsel" for defendant. Mr. Gould was retained to sue defendant for malpractice. Plaintiffs are twisting equitable indemnity beyond recognition. *Flint* simply has no bearing on this two-party negligence case.

The result reached in *Matson v. Weidenkopf*, 101 Wn. App. 472, (malpractice plaintiff cannot obtain a judgment against attorney greater than what could be recovered in underlying action) strongly indicates that Washington law follows the reasoning of the courts in *Moores v. Greenberg*, 834 F.2d 1105, and *Horn v. Wooser*, 165 P.3d 69, and should hold that the contingent fee must be considered, i.e., deducted, from the gross amount of the proffered settlement in calculating damages where the damage is caused by the attorney's negligent failure to relay or accept the settlement offer. The rationale of the decisions in *Moores* and *Horn*, that the "real world" result to the plaintiff in the underlying case must form the basis for the malpractice damages award, is precisely the same as that in

Matson. That rationale must govern the ruling here – the damages suffered by the plaintiffs are their loss of the $60,000 net settlement with State Farm – nothing more.

E. THE BREACH OF FIDUCIARY DUTY CLAIM ADDS NOTHING TO PLAINTIFFS' DAMAGES.

Plaintiffs have chosen to make much of defendant's after-the-fact breach of fiduciary duty in dissembling to his clients . However, the real gravamen of this case was and is defendant's negligence in failing to properly handle the offer of UM policy limits by State Farm. Plaintiffs do not contend that there was any breach of fiduciary duty prior to that time.

In *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598, *rev. denied,* 118 Wn.2d 1001 (1991) this court observed that claims of legal negligence and breach of fiduciary duty by an attorney are often coextensive:

> . . . both Kelly and Foster treated the case as an action for legal malpractice. Like many such cases, the basis of liability was a claimed breach of fiduciary duty . . . . A review of the Rules of Professional Conduct will suggest that most cases of proven legal malpractice will involve a breach of one or more fiduciary duties.

62 Wn. App. at 154, 155. *See also Hizey v. Carpenter*, 119 Wn.2d 251, 265, 830 P.2d 646 (1992); *Stoll v. Superior Court*, 9 Cal. App. 4th 1362, 12 Cal. Rptr. 2d 354 (1992).

The *Kelly* court's observation points up that with the exception of fee denial or disgorgement in cases involving disputes over the attorney's

fees, discussed below, there are not separate civil remedies provided by the law for legal malpractice and breach of fiduciary duty by an attorney. To the extent that a breach of fiduciary duty gives rise to the four elements of malpractice, including a resultant loss to the client, the remedy is in the law of damages for negligence. *Kelly v. Foster,* 62 Wn. App. 150. Where the breach of fiduciary duty does not cause identifiable loss to the client, the remedy is a public one, with the Bar Association, rather than a private remedy. *Hizey v. Carpenter,* 119 Wn.2d at 259.

Here, the loss suffered by the plaintiffs is fully compensated by damages for legal malpractice, plus prejudgment interest for the delay in plaintiffs' receipt of the money. There is no separate private civil remedy for breach of fiduciary duty, and there was in fact no loss caused by that breach, except for the time delay, which is compensated in the law as part of the damages for the negligence.

Plaintiffs cite a number of cases for the proposition that a breach of fiduciary duty can lead to a denial of attorney fees, *Dailey v. Testone*, 72 Wn.2d 662, 435 P.2d 24 (1967), or disgorgement of fees, *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983). But even where a breach of fiduciary duty is established, such cases do not mandate a forfeiture of fees:

> It is apparent that while attorney misconduct can be so egregious as to constitute a complete defense to a claim for fees, not every act of misconduct will justify such a serious

> penalty. It is implicit in the *Ross* opinion [*Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982)] that the trial court has discretion in deciding what impact, if any, lawyer misconduct will have on a claim for attorney's fees.

Kelly, 62 Wn. App. at 156.

More importantly, the fee forfeiture cases cited by plaintiffs are completely inapposite here, and serve only to create a misleading impression of the real issues in this case. The plain fact of the matter here is that the defendant has received no fees to disgorge or forfeit, and is making no claim for fees for the court to deny.

Plaintiffs argue the breach of fiduciary duty/fee forfeiture cases to support their contention that defendant should not get "credit" for the contingent fee he would have received but for the negligence. However, as pointed out previously, the use of the term "credit" is a false description, used to create a false impression that an actual fee is at issue, when the reality is the issue here is the actual loss to plaintiffs from the negligence – the money they would have recovered if the negligence had not occurred.

The real point of the plaintiffs' argument centered around the breach of fiduciary duty/fee forfeiture cases is the notion that defendant should be punished for the breach of fiduciary duty over and above the plaintiffs' actual loss. The plaintiffs' suggested punishment is payment by

defendant of the dollar value of a fee he never received, under the guise of forfeiture or disgorgment of the fee.

The plaintiffs attempt to stretch the law with this argument. None of the cases plaintiffs cite punish an attorney who breaches a fiduciary duty with monetary damages, apart from denial of fees, and/or damages for legal malpractice. None of the cases cited by plaintiffs award damages for breach of fiduciary duty, separate from the damages for legal negligence. *See Kelly v. Foster,* 62 Wn. App. 150. Plaintiffs have identified no support in the law for their scheme to create punitive damages for legal negligence under the guise of "forfeiture" of a fee never claimed or received.

Plaintiffs are fully compensated in this case for defendant's negligence and breach of fiduciary duty by the trial court's award of compensatory damages and prejudgment interest. The additional damages plaintiffs seek here are nothing more than the proverbial punitive "pound of flesh." The trial court's award of damages should be affirmed.

F. THE AWARD OF PREJUDGMENT INTEREST IS CORRECT.

The purpose of prejudgment interest is to compensate for the time value of money that has been withheld by Defendant. *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986); *Matson v. Weidenkopf*, 101 Wn. App. at 485.

Here, the money that was "withheld" by defendant, as a result of negligence or breach of fiduciary duty, was $60,000 – the recovery plaintiffs would have received in 1995 from their UM claim if there had been no negligence. That amount was the damage correctly awarded by the trial court, and the amount upon which prejudgment interest in the amount of $70,511.58 was calculated in the trial court's Order Granting Defendants' Motion for Clarification of Summary Judgment Order. (CP 339-40). Plaintiffs agree that the calculation of prejudgment interest on a principal damages sum of $60,000 equals $70,511.58. (CP 325).

Plaintiffs' contention appears to be that by awarding damages in the amount actually lost by the Shoemakes ($60,000), and then calculating prejudgment interest on this actual loss amount, somehow the trial court has "rewarded" defendant by "crediting" him "twice" with the contingent fee that he has not claimed or received. Plaintiffs' accounting techniques approach the mystical in this argument.

It seems plaintiffs contend they should receive a damages award of $100,000 against defendant, and should then be awarded prejudgment interest on that $100,000 (for an additional $117,591.31), (App. Br. 16). Plaintiffs' calculation achieves a windfall for plaintiffs amounting to $87,079.73 over the sum which compensates plaintiffs for the loss in 1995 (including the time value of that lost money until April 2006). This

calculation is simply a compounding of the plaintiffs' previously-discussed argument that the court should punish defendant by awarding plaintiffs a $40,000 "bonus" on their now-compensated damages of $60,000.

Plaintiffs also argue (App. Br. 19) that somehow the $100,000 in UM proceeds actually received by plaintiffs in April 2006 should only be considered to be $60,000 for purposes of determining the remaining damages owed by defendant. This argument simply makes no sense. The fact is that plaintiffs did receive $100,000 from the State Farm UM payment. (CP 61). It is inexplicable how plaintiffs can argue that $100,000 is really only $60,000.

The plain arithmetical facts, with which the trial court agreed, are that plaintiffs lost $60,000 because of defendant's negligence, and thus were awarded compensatory damages in that amount. The time value of that sum, between June 1995 and April 2006, was $70,511.58. Thus, the total award to plaintiffs, in full compensation of their loss, was $130,511.58. (CP 339-40) Plaintiffs received a payment from State Farm of $100,000 through the efforts of defendant and his counsel. That payment must be credited against the judgment award, leaving $30,511.58 owing by defendant, independent of the attorney fee award.

G. THE ATTORNEY FEE AWARD WAS CORRECT.

Defendant does not believe the trial court had authority to order an award of attorney's fees in this case, as there is no contract or statute providing for a fee award, and this case does not present a recognized ground in equity supporting a fee award. *Public Utility District No. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). That position is discussed in greater depth in defendant's cross-appeal, *infra*.

However, given that the trial court did conclude it had the power to award fees, defendant believes the award made was appropriate and fair in the circumstances of this case. The award is reflective of the trial judge's understanding of the overall case, and his appreciation of the issues that actually bore significance to the outcome, as opposed to those that were mere window dressing.

> The reasonableness of the amount of attorney fees is a factual matter within the trial court's wide discretion. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.* 64 Wn. App. 553, 556, 825 P.2d 714 (1992). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Hope v. Larry's M[arkets]*, 108 Wn. App. 185, 197, 29 P.3d 1268 (2001).

Somsak v. Criton Technologies/Heath Tecna, Inc., 113 Wn. App. 84, 98, 52 P.3d 43, 63 P.3d 800 (2002).

The process of exercising the trial court's discretion starts with the calculation of the lodestar fee amount, determined by multiplying the

reasonable hourly rate by the number of hours reasonably spent on the lawsuit. *Zink v. City of Mesa*, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007). That court pointed out:

> While the court should exclude any wasteful or duplicative hours and any hours for **unsuccessful theories** or claims, "an explicit hour-by-hour analysis of each lawyer's time sheets" is unnecessary as long as the court considers relevant factors and gives reasons for the amount awarded. *Progressive Animal Welfare Soc[iety] v. Univ[ersity] of Wash.*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989), *rev'd on other grounds*, 114 Wn.2d 677, 790 P.2d 604 (1990).

Zink at 137 Wn. App. at 277 (emphasis added).

Here, the trial court found: ". . . Sixty Five percent (65%) of the time spent by Counsel on the cross summary judgment motions [was] not reasonably necessary to resolution of this case and is therefore to be excluded from Counsel's actual time spent on this case to determine Counsel's reasonable time spent." Finding of Fact 1.7. (CP 376). The trial court's analysis here is precisely what the appellate courts require from a trial court in making a fee award determination.

Regarding the trial court's discretion in determining a fee award, the Court in *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007) noted:

> . . . it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation. See *Hensley* [*v. Eckerhart*], 461 U.S. at 437 [103 S.Ct. 1933 (1983)]. That

> is why the law requires us to defer to the trial court's judgment on these issues. The issue before us is not whether we would have awarded a different amount, but whether the trial court abused its discretion.

Pham, 159 Wn.2d at 540.

Plaintiffs contend that the trial judge did not have discretion to reduce the lodestar by 65 percent of the time spent on the cross motions for summary judgment, despite the court's observation during the litigation of the case (as set out in Findings 1.5 and 1.6) (CP 375-76) that the real driving force in the case was the plaintiffs' damages theory, which the court rejected in its Order on summary judgment. (CP 269-72). Plaintiffs seem to argue that damages theories are not, by themselves, stand-alone "claims" that can be "unsuccessful" for purposes of the lodestar determination. That position, of course, ignores the language quoted previously from *Zink v. City of Mesa*, noting that the court is to reduce the lodestar by hours spent on "unsuccessful theories or claims . . .". *Zink*, 137 Wn. App. at 277 (emphasis added).

More importantly, plaintiffs' argument plays on semantics unsupported by caselaw and which defy common sense. Plaintiffs would have the court presume that a "claim," for these purposes, can only be a stand-alone legal cause of action for liability, as opposed to a distinct portion ("theory") of a cause of action that can be rejected without

dismissing the entire cause. Plaintiffs do not cite any authority for that proposition. Moreover, plaintiffs do not explain why a distinct theory of damages cannot logically, in a proper case (like this), be considered a separate theory (or "claim") for purposes of reducing the lodestar figure by the time spent that was unnecessary to the successful result.

Instead, plaintiffs attempt to draw a smoke screen across the subject by contending that they "won" the summary judgment motions, and the damages claim that they lost should be viewed only as part of the "common core of facts and related legal theories" and thus ignored. (App. Br. 37) (emphasis omitted). However, as the trial court found, the plaintiffs' unsuccessful damage theory was the prime driver of the litigation. The liability theories which plaintiffs now claim were the major point of their motion for summary judgment were foregone conclusions from the beginning. Defendant admitted liability for legal malpractice, and in response to plaintiffs' motion did not contest breach of fiduciary duty. Further, defendant admitted the damages that the court eventually awarded (with the exception of the $7,912 subrogation lien). Defendant admitted that plaintiffs were entitled to prejudgment interest on the amount of plaintiffs' loss.

The only issue in significant dispute in the motions was the plaintiffs' argument that their damages were the entire amount of the

$100,000 UM policy limits, with prejudgment interest calculated on that amount, rather than the $60,000 sum that they actually would have recovered in 1995 but for the negligence.

In other words, plaintiffs lost the single significant issue contested on the summary judgment motions. That issue was in fact the single significant contested issue in the entire case. The trial court saw that reality for what it was, and ruled accordingly in exercising its discretion to establish the lodestar fee amount.

Plaintiffs would have this court create a rule that a trial judge may not exercise his or her powers of observation to determine the actual substantive litigated issues in the case before it for purposes of assessing what efforts were reasonably necessary to the result obtained. Plaintiffs would restrict the trial court to counting legal claims for liability which either did or did not prevail in order to exercise its "discretion" in calculating a lodestar fee amount. That is not the law in Washington, and plaintiffs' contention defies common sense. It would make the window dressing, such as the summary judgment motion to establish liability here, more significant to the attorney fees award than the actual issue disputed before the court.

The argument by plaintiffs that *Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86 (1996) or *Pham v. City of Seattle*, 159 Wn.2d

527, support their position is simply incorrect. The issue in *Martinez* was whether the trial court, in assessing attorney fees in a discrimination case, was bound by plaintiff's counsel's contingent fee agreement or the limited degree of success achieved in the case (jury verdict of $8,000 on a damage claim of $4 million). There was no issue in that case of segregation of unsuccessful claims from successful ones in terms of time spent.

In *Pham*, again a discrimination case, the trial court reduced the successful plaintiffs' fee award by $50,000 from the amount requested, on the ground that some of the time was "unnecessarily expended or not reasonably related to the plaintiffs' favorable resolution." 159 Wn.2d at 538-39. The Court of Appeals concluded that was error, and that the rejected hours were spent as part of the "common core of facts and related legal theories" that resulted in success. 159 Wn.2d at 539. The Supreme Court disagreed with the Court of Appeals on that score, and upheld the lodestar reduction as within the trial judge's discretion. Thus, *Pham* actually supports the decision made by the trial court here. So should this court.

H. THE DENIAL OF A LODESTAR MULTIPLIER WAS CORRECT.

The trial court rightly concluded that plaintiffs' counsel did not face a contingent risk in this case in its evaluation of the request for a lodestar multiplier. As noted previously, there was no real issue regarding

liability of defendant, as the facts were clear, and the negligence liability was admitted before the summary judgment motions were heard. Further, the State Farm policy limits of $100,000 were paid to plaintiffs very early in the case. There was no risk of recovering nothing.

Plaintiffs' arguments that the trial court was wrong in denying a multiplier seem to be that: (1) the court should always grant a multiplier where plaintiffs' counsel has a contingent fee agreement; and (2) defendant is uninsured and may not be able to pay a judgment. The first argument is not supported by the law. Plaintiff cites cases that permit multipliers in situations of contingent risk. They do not cite any cases that require the trial judge to grant a multiplier, or otherwise restrict the trial court's discretion in this regard. In fact, the Court in *Mahler v Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998) points out that the lodestar fee "may, in rare instances, be adjusted upward or downward in the trial court's discretion." (Emphasis added.) This case does not present a "rare instance." Certainly there is no authority supporting plaintiffs' apparent contention that contingent fee cases always present the "rare instance" contemplated by the Court in *Mahler*.

The second argument is fallacious, legally and factually. The reality is that plaintiffs' counsel never had a contingent risk of inability to collect the substantial portion of their legitimate judgment (and thus

contingent fee) in this case. Plaintiffs' counsel's risk extends only to the excessive and punitve damages award they have lobbied for (and lost) in the case. The reality is, pursuant to *Safeco v. Barcom*, 112 Wn.2d 575, 773 P.2d 56 (1989), State Farm was always liable for payment to its insured under the UM policy, despite the passage of time. Thus, plaintiffs and their counsel had only to ask (as they eventually did, through defense counsel), and State Farm would pay $100,000, as it did in April 2006.

At the point in the case at which State Farm paid the $100,000 (ten months before the hearing on the summary judgment motions), plaintiffs' counsel had expended only 6.4 hours on the case (total time between 11/03/2005 and 3/10/2006) (CP 285-86). Thus, not only was there no risk, plaintiffs' counsel already had the money in hand early in the case due to his contingent fee agreement. (CP 60-61).

In *Bowers v Transamerica Title Insurance Co.*, 100 Wn.2d 581, 598-99, 675 P.2d 193 (1983), the Court quotes from *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) "'the contingency adjustment is designed solely to compensate for the possibility . . . that the litigation would be unsuccessful and that no fee would be obtained.'" The *Bowers* Court follows that explanation with the point that ". . . the risk factor should be applied only to time expended before recovery is assured." 100 Wn.2d at 599. See also *Smith v. Behr Process Corp.*, 113

Wn. App. 306, 341-42, 54 P.3d 665 (2002). Recovery was assured from the very beginning here, and was in fact achieved in substantial degree very early. There simply was no risk that counsel would obtain no fee.

While plaintiffs claim a defendant's potential inability to pay a judgment should be considered a contingent risk for purposes of applying a lodestar multiplier, they cite no authority for that proposition. Further, the reality is in most cases, the defendant's ability to pay a judgment (absent a governmental defendant or applicable insurance coverage) is unknown until well after judgment is entered and fees have been assessed. Thus, the court in many cases would have no basis for determining whether there was indeed a contingent risk of nonpayment after entry of judgment. Finally, in this case there is no evidence as to whether defendant is unable to pay or not. All that is known is that he is not insured against this claim. A comment in defendant's brief opposing a lodestar multiplier to the effect that the punitive attorney fee award sought by plaintiffs would make payment more difficult (CP 318) does not demonstrate a contingent risk of non-payment.

Plaintiffs own actions demonstrate they do not believe there is a risk of inability to collect the judgment. If plaintiffs really believed defendant was unable to pay they would not be spending the time and money on this appeal in the attempt to secure an even larger judgment,

while depleting defendant's resources by the substantial expense of responding to plaintiffs' appeal.

The trial court was correct in concluding that a contingency lodestar multiplier was not warranted in this case.

I. THERE IS NO BASIS FOR AWARD OF ATTORNEY FEES PURSUANT TO RAP 18.1.

As argued in defendant's cross-appeal, *infra*, the trial court's decision to award attorney fees to plaintiff is not supported by law, as there is no contract, applicable statute, or recognized ground in equity serving as the basis for such an award. *PUD 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). Consequently, for that reason there is no basis for an award of fees pursuant to RAP 18.1.

Furthermore, the trial court's rulings as to the appropriate damages award to plaintiff and the amount of the attorney fee award were correct, and there thus should be no basis for an award of fees to plaintiff as a prevailing party on this appeal, even if a fee award were not otherwise improper.

V. CONCLUSION

Despite the clever semantics employed by plaintiffs in the attempt to misrepresent the real issues, the plain fact is the trial court applied established Washington law of damages in legal negligence cases (and indeed, in tort cases generally) to rule plaintiffs are entitled to recover

their actual loss resulting from defendant's negligence, plus prejudgment interest on the amount of that actual loss. Plaintiffs' arguments that the trial court has somehow "rewarded" defendant, or has allowed him "credit" (or, even, "double credit") for a contingent fee he has not claimed, are simply wrong on the facts and law. These arguments are merely disguised appeals for imposition of punitive damages, or an end run around the American rule requiring parties generally to bear their own attorney's fees and litigation costs when recovering damages from a tortfeasor. The trial court's award of damages and prejudgment interest is correct and should be affirmed.

The trial court's ruling on the proper lodestar fee award was also correct (subject to defendant's cross-appeal) under the circumstances present in this case, where the only meaningful substantive issue between the parties was plaintiffs' claim for enhanced damages in excess of the actual loss suffered by plaintiffs. Having rejected plaintiffs' erroneous damages theories, and correctly awarding plaintiffs damages equalling their actual loss, the court properly exercised its discretion to reduce the lodestar fee by the time spent on the unproductive attempt to collect punitive damages. Similarly, the court properly concluded that the plaintiffs' counsel were not facing a contingent risk of little or no

recovery, as the bulk of the damages award was available and in fact paid very early in the case in the form of the State Farm UM policy limits.

VI. CROSS-APPEAL ASSIGMENTS OF ERROR

The trial court erred in:

A. Entering that portion of the Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgment which awarded attorney fees and costs to plaintiffs. (CP 269-272).

B. Entry of the Order Denying Defendant's Motion for Reconsideration Re: Award of Attorney Fees. (CP 399-400).

C. Entry of the Order Granting Plaintiff Attorney Fees. (CP 379-80).

D. Entry of that portion of the Final Judgment which awards attorney fees and recoverable costs to plaintiffs. (CP 341-44).

VII. CROSS-APPEAL ISSUE PRESENTED

Does a finding of a breach of fiduciary duty in an attorney malpractice action entitle plaintiff to an award of attorney fees?

VIII. CROSS-APPEAL ARGUMENT

It has long been the law in Washington that attorney fees may be awarded only in limited circumstances:

> In the absence of a contract, statute, or recognized ground of equity, a court will not award attorney fees as part of the

> cost of litigation. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

PUD 1 v. Kottsick, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). *See also, ASARCO v. Air Quality Coalition*, 92 Wn.2d 685, 715, 601 P.2d 501 (1979); *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994); *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991).

Here, there is no contract or statute authorizing an award of attorney fees in litigation between the parties.

The trial court appears to have concluded, upon finding defendant breached his fiduciary duty to plaintiffs, that it had the equitable power to award fees to plaintiffs. The trial court's award of attorney fees to plaintiffs was punitive. Specifically the trial court ordered:

> Sanctions against Defendant are also appropriate for his deceit, misrepresentation, and breach of fiduciary duty. Plaintiff is therefore awarded reasonable attorney fees and costs incurred to Mr. Gould's office to prosecute this proceeding.

(CP 271).

The "sanctions" imposed by the court are actually a form of punitive damages, which have long been contrary to Washington law. These "sanctions" are not a recognized equitable ground for an award of attorney fees.

This court identified the available equitable grounds supporting an award of attorney fees in litigation in *Dempere v. Nelson*: "Washington

cases mention four recognized equitable grounds for awards of attorney fees: *'[B]ad faith conduct of the losing party*, preservation of a common fund, protection of constitutional principles, and private attorney general actions.' (Italics ours.) *Miotke v. Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984)." *Dempere*, 76 Wn. App. at 407.

None of the recognized equitable grounds supporting an award of fees encompasses breach of fiduciary duty or legal negligence. Plaintiff in *Perez v. Pappas* contended that ". . . a defendant is always liable for attorney fees when a lawsuit results from the defendant's breach of fiduciary duties." *Perez*, 98 Wn.2d at 845. The Court rejected that theory, and held that the plaintiff in that attorney breach of fiduciary duty case was not entitled to an award of fees.

This court considered, and rejected, a similar claim in *Kelly v. Foster,* 62 Wn. App. 150. Again, plaintiff claimed "an award of attorney's fees is mandated whenever a fiduciary breaches his or her duty." *Kelly*, 62 Wn. App. at 153. The court noted, as discussed previously, that the case before it was a legal malpractice case, involving a claim of breach of fiduciary duty, and ". . . that most cases of proven legal malpractice will involve a breach of one or more fiduciary duties." *Kelly,* 62 Wn. App. at 155. The court went on to hold:

> This is a legal malpractice action where there is a remedy at law and no equitable relief is requested or granted. While a breach of fiduciary duty was found by the jury, that fact alone does not mandate an award of attorney's fees as part of the cost of litigation. The trial court did not err in denying Kelly's request for attorney's fees.

Kelly, 62 Wn. App. at 155.

In the event plaintiffs here contend that a finding of breach of fiduciary duty is tantamount to bad faith conduct sufficient to constitute an equitable ground for awarding fees, the court in *Dempere* rejected that supposed equitable ground as a sort of "urban legend," unsupported by actual case law. After analysis of the history of this supposed equitable exception to the no-attorney-fee rule, the court held:

> The rationale which would support an award of attorney fees for intentional wrongdoing is the need to deter and punish bad faith misconduct. This is essentially the rationale behind punitive damages. *See Glass v. Burkett* [64 Ill. App. 3d 676, 381 N.E.2d 821 (1978)] However, Washington does not recognize punitive damages . . . .
>
> Our research has not discovered any other coherent rationale which would support awards of attorney fees for bad faith or intentional torts in a state (like Washington) which adopts the American rule but rejects punitive damages. Consequently, we hold that bad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees in Washington.

Dempere, 76 Wn. App. at 410.

Plaintiffs rely on *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) as authority for the award of attorney fees in breach of

fiduciary duty cases. (App. Br. 33). It appears the trial court may have relied on this case as well. However, the case does not actually stand for that proposition. As the Court in *Perez v. Pappas*, discussed in considering the claim before it that a breach of fiduciary duty renders the defendant liable for attorney fees:

> We disagree with appellants' intepretation of this language [quotation from *Hsu Ying Li* said to support the claim]. As stated in *Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 716, 601 P.2d 501 (1979), the "actual award [in *Hsu Ying Li*] stemmed from the prevailing party's having preserved partnership assets, *i.e.*, an identifiable fund." No similar considerations are present in the instant action.

Perez, 98 Wn.2d at 845.

The plaintiffs' claims in this case also do not present an effort to preserve a common fund, or any of the other recognized equitable grounds for awarding fees. As in *Kelly v. Foster,* this is simply an action to recover damages for themselves, "a traditional legal remedy." *Kelly,* 62 Wn. App. at 154.

Simply put, there is no authority for the contention that an award of attorney fees is proper, in law or equity, in a negligence and breach of fiduciary duty case. The authorities in fact reject such a contention. The trial court erred in awarding attorney fees.

Plaintiffs' citation to *Flint v. Hart,* 82 Wn. App. 209, 917 P.2d 590 (1996) as authority for awarding fees as "recovery of the costs of litigation

incurred in mitigating the damages caused by a former attorney's legal malpractice" (App. Br. 17, 23, 25) is completely off the mark. In *Flint*, the attorney's malpractice caused the former client to become embroiled in litigation with an a third party, triggering the equitable indemnity concept of *Manning v.Loidhamer,* 13 Wn. App. 766, 538 P.2d 136, *rev. denied*, 86 Wn.2d 1001 (1975) for recovery of fees incurred in the litigation with the third party. That concept has nothing to do with the notion of recovering fees incurred in litigation between the parties to the action for which fees are sought.

IX. CROSS-APPEAL CONCLUSION

No basis in Washington law exists supporting an award of attorney fees in this case. A breach of fiduciary duty is not a recognized ground in equity for the award of fees, and there are no other applicable theories. The trial court must be reversed as to its decision to award fees to the plaintiffs.

DATED this 26th day of September, 2007.

REED McCLURE

By _____
John W. Rankin, Jr. WSBA #6357
Attorneys for Respondents/Cross-Appellants

032448.000002/164018